No. 4362

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHN EARL and JOHN JOHNSON,
Plaintiffs-in-Error,

vs.

UNITED STATES OF AMERICA,
Defendant-in-Error.

BRIEF OF PLAINTIFFS IN ERROR.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

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Attorney for Plaintiffs in Error.

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Seattle, King County, Washington.

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STATEMENT OF THE CASE.

Plaintiffs in error were informed against in Count I of the information for having and possessing 192 gallons of whiskey, 12 gallons of gin and 3 pints of beer; and in Count III of the information with transporting the same liquor. Appellant, John Earl, was charged in Count II of the information with having been previously convicted of the offense of possession of liquor; and in Count IV with having been previously convicted of having transported liquor; but these two counts of the information were dismissed upon motion of the Government, made during the trial (Trans. p. 21).

Previous to the trial, appellants moved to quash the search warrant used in obtaining the evidence upon which the prosecution was based (Trans. p. 7), supporting the motion with the affidavit of both appellants (Trans. p. 8). This motion was denied by the court, and exception duly taken and allowed (Trans. p. 20).

At the trial appellants renewed their objection to the introduction of any evidence obtained by virtue of the search warrant, for the reason stated in their motion to suppress. This objection was

overruled and exception taken and allowed (Trans. p. 43).

No evidence was introduced by appellants on the trial, but at the close of the Government's case they moved the court to take the case from the jury, and to discharge the appellants, for want of sufficient legal evidence to convict. This motion was denied and exception allowed (Trans. pp. 46 and 47).

The motion was renewed at the close of the case, the same ruling was made and exception allowed (Trans. p. 47).

Trial resulted in a verdict of guilty as to both appellants upon counts I and III (Trans. p. 21).

Before sentence was passed both appellants moved the court in arrest of judgment upon Count I of the information, for the reason that the offense charged in Count I was included in the offense charged in Count III (Trans. p. 24). This motion was denied and exception duly taken and allowed (Trans. pp. 25 and 48).

The court then sentenced each appellant to pay a fine of $150.00 on Count I, and $150.00 on Count III (Trans. pp. 26 and 27).

Whereupon appellants sued out a writ of error to this court.

ASSIGNMENTS OF ERROR TO BE URGED HERE.

1. In due and seasonable time before trial the defendants, John Earl and John Johnson, moved the court for an order quashing the search warrant issued by United States Commissioner A. C. Bowman, and suppressing all evidence gained by reason or use thereof, for the reason and upon the ground that said search warrant and the affidavit upon which it was founded was invalid, which motion was denied by the court, to which ruling the defendants, and each of them, then and there excepted, which exception was by the court allowed; and now the defendants, and each of them, assign as error the ruling of the court upon said motion.

2. Upon the trial of said cause the defendants, and each of them, objected to the introduction of any evidence obtained from the execution of said search warrant, which objection was overruled by the court, and to which ruling of the court the defendants, and each of them, then and there excepted, which exception was by the court allowed; and now

the defendants and each of them assign as error the ruling of the court upon said objection.

3. At the close of the Government's case the defendants, and each of them, moved the court to take the case from the jury and discharge the defendants, and each of them, for the reason that no legal evidence had been introduced, sufficient to warrant the case being submitted to the jury, which motion was denied by the court, to which ruling the defendants, and each of them, then and there excepted, which exception was by the court allowed; and now the defendants, and each of them, assign as error the ruling of the court upon said motion.

4. Again at the close of all the evidence the defendants, and each of them, renewed the said motion, and the court again denied the same, to which ruling of the court the defendants, and each of them, then and there excepted, which exception was by the court allowed; and now the defendants, and each of them, assign as error the ruling of the court upon said motion.

6. Thereafter and before judgment, the defendants, and each of them, moved the court for an order in arrest of judgment upon the verdict of

the jury upon Count I of the information for the reason and upon the ground that the charge in Count I against said defendants, to wit: the possession of intoxicating liquor, is and was included in the charge against the defendants contained in Count III of the information, to wit: the transportation of the same intoxicating liquor, upon both of which counts the jury found said defendants guilty, which motion was denied by the court, and to which ruling of the court the defendants, and each of them, then and there duly excepted, and the exception was by the court allowed; and now the defendants, and each of them, assign as error the ruling of the court upon said motion.

The court thereafter entered judgment and sentence against said defendants, and each of them, upon the verdict of guilty rendered upon the said information, Count I thereof and Count III thereof, to which ruling and judgment and sentence the defendants excepted, which exception was by the court allowed, and now the defendants, and each of them, assign as error that the court so entered judgment and sentence upon said verdict (Trans. p. 31 *et seq.*).

ARGUMENT.

Assignments 1, 2, 3, 4 and 7 will be argued together, as they involve the same point, namely, the insufficiency of the showing of "probable cause" in the affidavit filed as a basis for the search warrant issued and executed, by virtue of which all the evidence in the case was obtained; and the illegality of the search warrant itself.

The Affidavit.

The affidavit is found at page 8, *et seq.* of the transcript, and we will dissect it.

> "that a crime against the Government of the United States in violation of the National Prohibition Act of Congress was and is being committed, in this, that in the City of Seattle * * * one Bennie Goldsmith, Dave Viess, J. Engel and John Doe Greenberg, true name to affiant unknown, on the 27th day of December, 1923, and thereafter was and is possessing, transporting, and selling intoxicating liquor all for beverage purposes;"

Under the ruling of this court in *United States vs. Locknane,* decided by this court November 10, 1924, No. 4314, not yet reported, this allegation is of no force or effect, no matter who was involved. But in addition thereto, it is to be noted that it was alleged and not denied that no one of the parties

mentioned had any connection of any character with any of the properties involved in the search (Trans. p. 14).

> "that in addition thereto, affiant made investigation of 2011 E. Terrace on above date and saw said persons above named enter the basement of said building and load something into a Ford car, but on account of darkness, affiant could not describe;"

It would be impossible to make a statement more devoid of fact, especially as "2011 E. Terrace" is a residence distinct from the basement (Trans. p. 17), and the "said persons" mentioned are strangers to the record.

> "that said packages were taken to New Avon Hotel; that both 2011 East Terrace and New Avon Hotel have been reported as bootlegging joints and all the above persons engaged in bootlegging business exclusively."

"Have been reported" is hearsay; and besides, the residence "2011 E. Terrace" is a residence in possession of one not the appellants, or in anywise connected with them (Trans. p. 17); and besides, appellants are not to be charged with the tainted reputation of strangers.

"that on December 28, 1923, affiant saw several

persons enter and leave said basement above referred to;"

Comment is unnecessary.

"that affiant believes a large cache of liquor is kept in said basement, which is used as a garage, all on the premises described as 2011 E. Terrace Avenue, including the basement under same and the outbuildings on alley just south of 2011 E. Terrace and on the premises used, operated and occupied in connection therewith and under control and occupancy of said above parties;"

Under all the authorities, affiant's "belief" is of no consequence; but it is necessary that he state facts upon which the court issuing the warrant can form a conclusion of his own.

It is respectfully urged that this affidavit was void of any showing of "probable cause."

The Search Warrant.

The warrant was a "general" warrant, involving several properties, rather than one confined to a property "particularly described," as required by the constitution, statutes and all the cases.

A sketch of the properties involved, drawn approximately to scale, is furnished in the transcript, at page 15.

"Property No. 1," on the corner, is owned by a man named Coleman, who lives in the front house.

In the rear on the alley is "No. 2011," referred to in the affidavit. This is rented to a man not a party to the record in anywise. Under this residence is the "basement," or garage, referred to in the affidavit. This basement, or garage, was rented to appellants, who were in possession thereof. (Trans. p. 17).

"Property No. 2," next to it, was owned by one Sadick, who lived in the residence at the front. He had three garages shown in the rear, "No. 1," "No. 2" and "No. 3." "No. 2" was reserved by him for the use of himself and family. "No. 1" and "No. 3" were rented to parties not parties to the record in anywise (Trans. pp. 17 and 18). The garages apparently were "the outbuildings on the alley just south of said "2011 E. Terrace," referred to in the affidavit and warrant.

The search warrant, then, was aimed at five different and distinct properties: the residence No. 2011; the basement, or garage, underneath; the three different garages to the south, under distinct ownerships. This makes the warrant a general warrant. not a warrant directed at a place "particularly described," as required by law.

For such reason, the warrant was void.

The affidavit was defective, and the warrant was defective. Either defect made the search and seizure unlawful; and the motion to suppress the evidence obtained thereby should have prevailed.

A reading of the record shows no evidence was offered sufficient to convict, without the use of that illegally obtained, and for the error of the court in allowing the Government to use the tainted evidence the case should be reversed.

When reversed, we think the order should be to direct the lower court to discharge appellant, because the motion to take the case from the jury and to discharge the appellants for want of sufficient *legal* evidence, made at the close of the Government's case, and renewed at the close of the entire case (Trans. p. 47) we believe to have been well taken.

ASSIGNMENT OF ERROR NO. 6.

Appellants moved the lower court in arrest of judgment upon Count I of the information, for the reason that the charge in that count, namely, possession, was included in the charge contained in Count III, namely, the transportation of the same liquor, upon both of which counts appellants had been found guilty.

The evidence was that the officers saw appellants drive an automobile into the garage. The officers immediately entered and searched the premises and the automobile. They found liquor in the automobile. None other was found on the premises. On this state of facts the Government predicated its charge of possession and its charge of transportation, both involving the same identical liquor.

Appellants contend that under the circumstances they can be punished on one count only, namely, transportation, because transportation of liquor includes the possession of the same liquor, at least in the case at bar. There was but one transaction, and both charges were proved by the same identical evidence. There was no evidence to prove one charge that was not relied upon to prove the other. Therefore, to punish for the transportation of liquor, and then to punish for the possession of the same liquor, is to inflict a double punishment for one offense.

It has been held that possession and sale constitutes but one offense.

Muncy vs. U. S., 289 Fed. 780.

It has also been held that the manufacture of

moonshine whiskey necessarily embraces the offense of having in possession the same moonshine whiskey.

Morgan vs. U. S., 294 Fed. 82.

Also see

Reynolds vs. U. S. (C. C. A), 280 Fed. 1.

Rossman vs. U. S., (C. C. A.), 280 Fed. 950.

Re Neilson, 131 U. S. 176, 33 L. Ed. 118.

In the event a reversal is not ordered, this court should order, at least, that the sentence be corrected as to both appellants, and the sentence on Count I as to each be remitted.

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